

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

NEIL GAIMAN and
MARVELS AND MIRACLES, L.L.C.,

Plaintiffs,

v.

TODD MCFARLANE,
TODD MCFARLANE PRODUCTIONS,
INC., TMP INTERNATIONAL, INC.,
MCFARLANE WORLDWIDE, INC., and
IMAGE COMICS, INC.,

Defendants.

84
DOCKET #
U.S. DISTRICT COURT
WEST DIST. OF WISCONSIN
AUG - 1 2002
FILED
JOSEPH W. SKUPNIEWITZ CLERK
CASE #

Case No.: 02-C-0048-S

03-1461

AFFIDAVIT OF ALLEN A. ARNTSEN

STATE OF WISCONSIN

COUNTY OF DANE



03-1461-L07

U.S.C.A.—7th Circuit
FILED

NOV 26 2003 JC

GINO J. AGNELLO
CLERK

Allen A. Arntsen, hereby declares as follows:

1. I am one of the attorneys representing plaintiffs Neil Gaiman and Marvels and Miracles, L.L.C. ("Gaiman") in this matter.

2. Attached as Exhibit A is a true and correct copy of the transcript of the July 23, 2002 deposition of Terri Cunningham as was provided to me by Manhattan Reporting Corp., the court reporting service retained to record this deposition.

Allen A. Arntsen

Subscribed and sworn to before me
this 1st day of August, 2002.

Terri A. Tinker
Notary Public, State of Wisconsin
My Commission: Expires 12-22-02

¹
COPY

1
2 UNITED STATES DISTRICT COURT
3 SOUTHERN DISTRICT OF NEW YORK

4 -----x
5 NEIL GAIMAN and
6 MIRACLES AND MARVELS, LLC,

Plaintiffs,
Civil Action No.
02-C-0048-S

-against-

8 TODD McFARLANE, et al.,

9 Defendants.

10 -----x
11 **CONFIDENTIAL, ATTORNEYS' EYES ONLY**
12 **PURSUANT TO PROTECTIVE ORDER**

13 July 23, 2002
1:05 P.M.

14 Deposition of TERRI CUNNINGHAM, taken by
15 the Defendants, pursuant to notice and subpoena,
16 at the offices of Paul, Weiss, Rifkind, Wharton
17 & Garrison, 1285 Avenue of the Americas, New
18 York, New York, before Marlene Lee, Certified
19 Shorthand Reporter, Certified Realtime Reporter
20 and Notary Public within and for the State of
21 New York.

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23
24
25


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1 TERRI CUNNINGHAM - CONFIDENTIAL, ATTORNEYS' EYES ONLY

2 T E R R I C U N N I N G H A M,
3 having been called as a witness and duly sworn
4 by the notary (Marlene Lee), was examined and
5 testified as follows:

6 EXAMINATION BY MR. KAHN:

7 MR. KAHN: The record should show
8 this is the deposition of Terri Cunningham,
9 taken pursuant to subpoena.

10 Q. Ms. Cunningham, could you state
11 your full name and your employer and your
12 business address for us.

13 A. My name is Terri Cunningham. My
14 employer is DC Comics. The business address is
15 1700 Broadway, New York, New York. 10019.

16 Q. Terri, my name is Michael Kahn, and
17 with me is Pete Salsich. We represent several
18 of the defendants. I represent Todd McFarlane,
19 Todd McFarlane Productions, Inc., TMP
20 International, Inc., and McFarlane Worldwide,
21 Inc. There's another defendant, Image Comics,
22 that does not have an attorney here today.

23 Yesterday your attorneys were kind
24 enough to send over a group of documents that
25 they had stamped with the numbers DC 0001

1 TERRI CUNNINGHAM - CONFIDENTIAL, ATTORNEYS' EYES ONLY
2 through 0034. And what I'd like to do at the
3 outset is ask the court reporter to mark this as
4 Group Exhibit DC and show it to you, and if you
5 could confirm to me that these are the
6 nonprivileged documents that are being produced
7 by DC Comics today, pursuant to that subpoena.

8 (Group Exhibit DC for
9 identification, nonprivileged documents produced
10 pursuant to subpoena.)

11 Q. If you'll take a moment and look
12 through those, Terri.

13 A. Yes, they are.

14 MR. PERKINS: These records have
15 been designated confidential, attorneys' eyes
16 only, under the protective order that the
17 parties have entered into in the case. I'm
18 reiterating that on the record, with the hope
19 these will be kept confidential, attorneys' eyes
20 only.

21 MR. ARNTSEN: Why don't we have the
22 transcript designated confidential, attorneys'
23 eyes only.

24 MR. PERKINS: I was just going to
25 suggest that.

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2 MR. KAHN: Yes. There are
3 provisions that would allow a party to challenge
4 those designations, which may never happen or
5 could happen, but if they do, Allen would
6 contact you if one of the parties wanted to
7 challenge that.

8 MR. PERKINS: Understood.

9 Q. Terri, before we get into your
10 background and involvement at DC Comics, I just
11 have one other question about this Group Exhibit
12 DC. Are all of these documents from your own
13 files? Or are some of these documents from
14 other DC Comics files?

15 A. I believe these are from my files.

16 Q. Can you start off by summarizing
17 your educational background?

18 A. Sure. College, I went to school
19 for -- I have a degree -- associates degree in
20 science laboratory technology. Graduated from
21 SUNY Cobleskill in 1977. That's the extent.

22 Q. When did you first become an
23 employee of DC Comics?

24 A. In 1983.

25 Q. What did you do between '77 and

1 TERRI CUNNINGHAM - CONFIDENTIAL, ATTORNEYS' EYES ONLY
2 '83?

3 A. I worked for a company in New York
4 for five and a half years, Bering Hutchinson
5 Company.

6 Q. What did you do for them?

7 A. I actually was a clerical person.

8 Q. What was your job title, if you
9 recall, back in 1983 when you joined DC Comics?

10 A. I was coordinator of special
11 projects.

12 Q. What did that mean?

13 A. There was a special projects
14 department, and I did clerical work.

15 Q. Could you just move us through,
16 from '83 to the present, your different job
17 titles, if you can remember the dates, when you
18 got them, and get us to the present.

19 A. I've been at DC for 19 years.
20 After two and a half years in that job I moved
21 into editorial as manager of editorial
22 administration. And between then and now I've
23 had a few different promotions, the last being
24 six years ago to vice-president, managing
25 editor. So I've had a few different in there.

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2 I do not recall the dates.

3 Q. That promotion to vice-president
4 would have been in 1996?

5 A. Yes.

6 Q. At what point in your 19 years at
7 DC Comics did you begin dealing at all with
8 contracts with guest writers, freelance writers
9 and artists who were working in comic books for
10 DC Comics?

11 A. Probably the '80s.

12 Q. Would it have been after the time
13 you became manager of editorial administration?

14 A. Yes.

15 Q. What was the nature, back then, of
16 your involvement with contracts with writers and
17 artists who were working in comic books for DC
18 Comics?

19 A. Ensuring they went out and they
20 were signed by the talent.

21 Q. Did that job function ever change
22 over time?

23 A. It grew as I added more
24 responsibilities.

25 Q. You know Todd McFarlane?

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2 A. I do.

3 Q. What was the origins of your
4 relationship with Todd?

5 MR. PERKINS: Object to the form.
6 Misstates prior testimony. She didn't testify
7 there was a relationship.

8 MR. KAHN: That's a good objection.

9 Q. Tell me when you first met Todd.

10 A. I don't recall the year.

11 Q. Did you ever work with Todd when he
12 was doing work for DC Comics?

13 A. Yes.

14 Q. And when -- what was that period?

15 A. I don't recall exactly when it was.
16 Probably in the early -- my early time in
17 editorial.

18 Q. Sometime during the 1980s?

19 A. Yes.

20 Q. And probably an earlier portion of
21 the 1990s?

22 A. Probably.

23 Q. What was the nature of your work
24 with Todd back then?

25 A. I don't recall the specific project

1 TERRI CUNNINGHAM - CONFIDENTIAL, ATTORNEYS' EYES ONLY
2 that we were working on with him.

3 Q. Do you think he was involved with
4 some issue for the comic book?

5 A. Yes. I think he drew something for
6 us.

7 Q. He was doing artwork at the time?

8 A. Yes.

9 Q. Was he the penciler? Inker?

10 A. I believe he was the penciler.

11 Q. Todd has looked for his copies of
12 any DC contracts that he may have had. We
13 haven't been able to find any yet. But was it
14 the practice of DC Comics back at the time that
15 you were working with Todd when he was doing
16 penciling for one of the issues that there would
17 be a written contract with the artist?

18 A. Yes.

19 Q. What type of contract was there
20 with an artist?

21 A. A contract that guaranteed him page
22 rate royalties, book by book.

23 Q. Was there a name for that type of
24 contract within DC Comics?

25 A. We call it a voucher.

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2 Q. A voucher. Was that typically more
3 than one page?

4 A. No.

5 Q. Was the voucher form of contract
6 used only for artists?

7 A. No. Anyone that provided services.

8 Q. So writers would also be given a
9 voucher contract?

10 A. Yes.

11 Q. And the voucher contract would have
12 in it, among other things, a page rate that the
13 artist was to be paid?

14 A. Yes.

15 Q. Were there also royalty provisions?

16 A. Yes.

17 Q. And how did those work? Without
18 getting into the specifics, you got a certain
19 page rate for penciling an issue?

20 A. Yes.

21 Q. Then royalties came along
22 afterwards if the sales reached a certain
23 number?

24 A. Correct. Yes.

25 Q. Were the royalty rates for the

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2 artists back when Todd was doing work for DC
3 Comics standard?

4 A. Yes.

5 Q. So it didn't matter which artist it
6 was. If you were working in this comic book,
7 here was your page rate?

8 A. Yes.

9 Q. Was that the same with writers?

10 A. Yes.

11 Q. Back in the 1980s did DC Comics
12 have full-time employees of DC Comics who were
13 providing either artwork services or writing
14 services in comic books?

15 A. I don't believe so.

16 Q. It was mainly freelance, or mostly
17 freelance?

18 A. Yes.

19 Q. And is that the term that you used?

20 A. Yes.

21 Q. Back at the time that Todd was
22 doing penciling artwork on comic books in the
23 1980s, was there something at DC Comics known as
24 a character equity agreement?

25 A. I'm sorry. I don't understand the

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2 whole question.

3 Q. We've seen in this case -- there
4 has been produced in this case, both from DC
5 Comics and also Neil Gaiman, different types of
6 contracts, including one type of contract which
7 I'll show you in a little bit. It appears to be
8 called a character equity agreement. My
9 question to you is: Were there character equity
10 agreements back in the 1980s?

11 A. I believe so. Yes.

12 Q. Were there character equity
13 agreements back in the 1980s for pencilers or
14 other artists?

15 A. Yes.

16 Q. So it was not just limited to
17 writers.

18 A. No. It wasn't limited.

19 Q. Did Todd ever have a character
20 equity agreement with DC Comics?

21 A. I don't recall. I don't recall.

22 Q. One way or the other.

23 A. One way or the other, if he did.

24 Q. After the 1980s did you have any
25 other professional involvement with Todd

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2 McFarlane?

3 A. Yes.

4 Q. What was that?

5 A. DC and Todd entered into an
6 agreement to do Bat Man Spawn crossover, so I
7 interceded in some of the business aspects.

8 Q. When was that?

9 A. I couldn't tell you. I don't
10 recall.

11 Q. Was that a one-comic deal?

12 A. I don't recall.

13 Q. Other than the Bat Man Spawn
14 crossover, were there any other business or
15 professional relationships between DC Comics and
16 Todd McFarlane that you were privy to?

17 A. Not that I recall.

18 Q. In looking through the various
19 agreements that Neil Gaiman has been a party to
20 with DC Comics over the years, there appear to
21 be two types of agreements. To speed this up,
22 I'll tell you what there appear to be and you
23 can tell me if I'm right or wrong. There
24 appears to be a writing services agreement, and
25 there also appear to be something called

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2 character equity agreements. Is that a fair
3 characterization of the types of agreements DC
4 Comics has?

5 A. Yes.

6 Q. What are the writer services
7 agreements?

8 A. They provide work for the writer to
9 provide services for us to write our comics.

10 Q. And are these -- I realize that
11 they're longer and more detailed -- are these
12 what were formerly known as the vouchers?

13 A. It depends.

14 Q. On the typical writer's agreement
15 there is a page rate?

16 A. Yes.

17 Q. And are there royalty provisions?

18 A. Yes.

19 Q. And does every writer who does work
20 for DC Comics on a comic book do so pursuant to
21 a writer's services agreement?

22 A. Yes.

23 Q. What are character equity
24 agreements?

25 A. They are an agreement that gives a

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2 financial participation to a creator who creates
3 a character in one of our books.

4 Q. Does every writer who creates a
5 character in one of your books get a character
6 equity agreement?

7 A. No.

8 Q. I believe you testified earlier
9 that character equity agreements are also
10 available to at least some artists who work on
11 these books?

12 A. They are. Yes.

13 Q. Terri, I'm going to show you what
14 we previously marked in another deposition as
15 Exhibits 57 and 58, which appear to be a
16 writer's services agreement and a character
17 equity agreement, these signed by Neil and DC
18 Comics. I'm going to first ask you to take a
19 look at them and tell me if you can identify
20 what they are.

21 A. Yes, this first one is a writer's
22 services agreement. And the second one is a
23 character equity agreement.

24 Q. While I realize that each document
25 with each writer may be slightly different, is

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2 there essentially a form for each of these
3 documents or a template that people work from?

4 A. Yes.

5 Q. And looking at Exhibit 57 as an
6 example of what I understand to be a services
7 agreement -- is that correct?

8 A. Yes. This is a service agreement.

9 Q. Who would have prepared a DC Comics
10 Exhibit 57?

11 A. The legal department.

12 Q. And the same question for Exhibit
13 58, character equity agreement.

14 A. The legal department.

15 Q. With respect to these two
16 contracts, what would your involvement have
17 been?

18 A. My department requests this type of
19 material of the legal department.

20 Q. So, for example, on Exhibit 57,
21 your department would give some basics of what
22 the agreement was to cover, how many issues,
23 what the title of it is, what the page rate
24 should be --

25 A. Yes.

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2 Q. -- and then the legal department
3 would generate a contract?

4 A. Yes.

5 Q. How would it work for character
6 equity agreements?

7 A. The same procedure.

8 Q. Earlier you stated that every
9 writer who was doing writing services for DC
10 Comics would have a writer services agreement
11 similar to, though with different terms, the
12 Deposition Exhibit 57; correct?

13 A. Yes. Similar but different.
14 Different terms, yes.

15 Q. But not every writer would get a
16 character equity agreement.

17 A. Yes.

18 Q. How, during the 1980s, did DC
19 Comics determine who was entitled to be given a
20 character equity agreement? What were the
21 factors involved?

22 MR. PERKINS: Objection.

23 Foundation. You may answer if you know.

24 A. I don't recall in the early '80s.

25 Q. I didn't mean the early '80s. I

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2 mean the 1990s. Sort of the Neil Gaiman era.

3 First question: Did anybody besides Neil Gaiman
4 at DC Comics in the 1990s receive a character
5 equity agreement?

6 A. Yes.

7 Q. Were there many other people who
8 received character equity agreements?

9 A. Yes.

10 Q. During the 1990s many other people
11 received character equity agreements, but not
12 all writers received character equity
13 agreements?

14 A. Yes.

15 Q. How would you determine who was
16 entitled to receive a character equity
17 agreement?

18 A. The creator has to request it.

19 Q. Okay. So we have our hypothetical
20 creator who says, "I would like a character
21 equity agreement."

22 A. Yes.

23 Q. What did DC Comics then look at to
24 determine whether that writer was entitled to a
25 character equity agreement?

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2 A. The company has developed a set of
3 parameters that is used to judge if equity is
4 given.

5 Q. And what are those parameters?

6 A. The originality of the character.
7 The costumes. The powers. I don't recall
8 actually the rest of them.

9 Q. When you say "the originality of
10 the character," help me understand what that
11 means.

12 A. I can't. Those decisions are made
13 not by me.

14 Q. Do you have any involvement or any
15 input into those decisions?

16 A. No.

17 Q. Who at DC Comics makes those
18 decisions?

19 A. The president and publisher.
20 Today's president and publisher.

21 Q. Is that Paul Levitz?

22 A. It is.

23 Q. Has any writer ever asked you if he
24 or she could have a character equity agreement?

25 A. Yes.

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2 Q. And what is the process at DC
3 Comics from the point when you are asked by a
4 writer for a character equity agreement? What
5 happens next?

6 A. My department -- I have a staff
7 working for me, and they literally put the
8 information on a form that is then sent up to
9 the president and publisher who makes a
10 decision, and then it goes to legal for
11 contract.

12 Q. And does your department on this
13 form make a recommendation one way or another
14 with respect to character equity?

15 A. No.

16 Q. If you would take a look at what
17 we've marked as Group Exhibit DC. Is there in
18 that group an example of that form you just
19 mentioned?

20 A. No. The form is not in here, as I
21 recall.

22 Q. Is the form a one-page form?

23 A. Yes.

24 Q. And what is on the form?

25 A. It's a blank form that has lines

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2 that information needs to be completed by the
3 creator, or the editor on behalf of the creator.

4 Q. So is there, like, a subject --

5 A. Wait.

6 The form is not here.

7 Q. What types of subject matters are
8 to be filled in on these blanks on the form?

9 A. The first appearance of the
10 character. The name. Obviously the creator.
11 Publication date of first issue. And then these
12 parameters: How original. Costume. Powers.
13 And something else that I can't think of.

14 Q. Looking at Exhibit 58, there are,
15 under the section entitled "Royalties,"
16 different categories for royalties and different
17 percentages of numbers that are filled in. I
18 look, for example, on page 3 of this exhibit
19 under D for media rights. There's an amount
20 that states 15 percent of the publisher's net
21 receipts.

22 Is there a standard number --
23 strike that. Is there a standard royalty
24 percentage for media rights on DC character
25 equity agreements?

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2 A. Yes.

3 Q. And what is that standard?

4 A. The standard would be 10 percent
5 for the creator.

6 Q. And who is the creator if there is
7 a writer who works on the issue and an artist?

8 A. It's 10 percent for the writer
9 creator, and 10 percent for the artist creator,
10 for media.

11 Q. Let me also ask you to look on that
12 same page, page 3, of Exhibit 58. There's a
13 category called "Merchandising and Promotional
14 Licensing."

15 A. Yes.

16 Q. For this contract, which is the one
17 with Neil Gaiman, the number there is 15
18 percent. Is that the standard writer creator
19 number? Or is the standard number 10 percent?

20 A. I don't recall.

21 Q. Are there character equity
22 agreements where the royalty percentages on
23 media rights and/or merchandising and
24 promotional licensing are less than 10 percent
25 to a writer creator?

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2 A. I don't recall.

3 Q. This particular agreement, which is
4 Exhibit 58, is dated apparently February 1st,
5 1993. And my question is: Looking through the
6 form of this agreement, section 1 entitled
7 "Royalties" and different items for royalties,
8 and section 2 entitled "Contingencies Affecting
9 Royalties," is this a form that was used
10 throughout most of the 1990s?

11 A. I don't believe so.

12 Q. How is this form different?

13 A. I can't give you -- I don't recall.

14 Q. We'll show you some others that
15 span the period. If there are some differences,
16 maybe you can point them out. You mentioned, in
17 determining whether an artist was entitled to a
18 character equity agreement, that one of the
19 factors is the originality of the creation. Are
20 you familiar with a term known as a derivative
21 or a derivative character?

22 A. I'm familiar with it.

23 Q. How would you define "derivative"?

24 A. A derivative is something that
25 comes from something else.

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2 Q. Are there comic book characters
3 that would be or could be called derivative
4 characters in that they are based on another
5 character?

6 A. Yes.

7 Q. Can you think of some examples in
8 the DC Comics world of derivative characters?

9 A. Not off the top of my head, no.

10 Q. You're familiar with the Bat Man
11 character from DC Comics?

12 A. Yes.

13 Q. Has there ever been, during the
14 time you were at DC Comics, a Bat Man-like
15 character who was not Bat Man but existed either
16 in another era or in another dimension?

17 A. Not that I recall.

18 Q. What about Superman? Have there
19 been other Supermen?

20 A. Yes.

21 Q. Give me an example of another
22 Superman.

23 A. Superman Blue and Red. I'm trying
24 to remember.

25 Q. What was Superman Blue and Red?

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2 A. I don't recall exactly except the
3 name.

4 Q. What would you call the Superman
5 Blue and red character?

6 A. It was a form of Superman.

7 Q. A form of Superman. Would it be
8 called a derivative character, or would it have
9 a different name?

10 A. I don't know.

11 Q. What do they call it within DC
12 Comics?

13 A. I think he was called Superman Blue
14 and Red. Sorry.

15 Q. That's okay. When Neil Gaiman
16 began working on the Sandman comics, was there a
17 pre-existing character known as Sandman?

18 A. Yes.

19 Q. And was he a DC Comics character?

20 A. Yes.

21 Q. How would you describe the work
22 that Neil did with that character in either
23 adding originality or other qualities that
24 entitled him to character equity?

25 A. He did just that. He added

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2 original qualities that was determined gave him
3 character equity in that character that he
4 worked on.

5 (Exhibit DC-1 for
6 identification, service agreement, 4-20-88,
7 production Nos. G 04075 through G 04086.)

8 (Discussion off the record.)

9 Q. I've asked the court reporter to
10 mark and give you as Deposition Exhibit DC-1 a
11 document numbered G 04075 to 4086, dated April
12 20th, 1988.

13 I ask you, Terri, if you can
14 recognize what this document is.

15 A. By looking at this, I believe this
16 is a service agreement.

17 Q. Can you determine what this service
18 agreement is for?

19 A. For Sandman, to provide full
20 script.

21 Q. Can you tell how many scripts are
22 supposed to be provided?

23 A. No, because paragraph 7 doesn't
24 exist.

25 Excuse me. No. I can't.

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2 Q. Let me ask you to look at,
3 actually, paragraph 8 of this agreement, and
4 specifically paragraph 8-C, which reads, "It is
5 understood and agreed that if, after writer has
6 supplied the full script for the first 12
7 consecutive issues of the work, writer shall
8 have created and/or shall subsequently create
9 wholly original characters for the work, DC
10 shall grant writer creator equity in those
11 characters only, according to DC's standard
12 policy."

13 My first question is: Do you
14 recognize this particular contract?

15 A. I don't.

16 Q. Does this suggest to you that this
17 April 20, 1988 document marked as Exhibit DC-1
18 was for the first 12 issues of Sandman?

19 MR. PERKINS: Objection. The
20 document speaks for itself. If you can
21 answer --

22 A. I don't.

23 Q. Is this the usual paragraph 8-C in
24 your services agreement?

25 A. No.

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2 Q. Do you recall any discussions
3 regarding an agreement with Neil Gaiman that if
4 he wrote 12 issues and would meet certain
5 criteria, he would be entitled to character
6 equity?

7 A. No, I don't recall.

8 Q. Back in the late 1980s and very
9 early 1990s do you recall any discussions with
10 anyone at DC Comics including a request from
11 Neil Gaiman for character equity rights in
12 Sandman or Sandman characters?

13 A. Could you repeat that question?

14 Q. Sure. Back in the late 1980s and
15 early 1990s do you recall any conversations with
16 others at DC Comics regarding a request by Neil
17 Gaiman for character equity in any of the
18 Sandman characters?

19 A. Yes.

20 Q. What do you recall?

21 A. I recall dealing with his agent at
22 the time, negotiating work for Neil.

23 Q. So those discussions were, in fact,
24 between you and -- is it Merilee Haifetz?

25 A. It is, yes.

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2 Q. Do you recall the period of time
3 that you and Merilee were negotiating the
4 character equity agreement?

5 A. Nothing more specific than we
6 negotiated back then.

7 (Exhibit DC-2 for
8 identification, letter agreement, 1-2-90, to
9 Gaiman, from Levitz.)

10 MR. KAHN: I've asked the court
11 reporter to mark as Deposition Exhibit DC-2 a
12 January 2nd, 1990 letter agreement to Neil
13 Gaiman from Paul Levitz which includes, as you
14 will see, some character equity provisions.

15 Q. Terri, is this a contract you
16 recognize?

17 A. No.

18 Q. Is this exhibit, DC-2, a contract
19 that you participated in the negotiation of?

20 A. I don't recall.

21 Q. Do you see in the first paragraph
22 it refers to the earlier agreement? It says,
23 "This will expand our agreement." Is this what
24 you would call a 1990 version of a character
25 equity agreement?

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2 A. No.

3 Q. What would you call this?

4 A. It's an amendment to his prior
5 agreement for services.

6 Q. What does this agreement do for Mr.
7 Gaiman, if anything, in addition to what his
8 prior agreement had done?

9 A. It amends his page rate. It adds
10 another 12 issues, I believe, to his services.
11 And it does include equity information.

12 Q. According to paragraph 3, which
13 maybe is what you're referring to, it upgrades
14 his status from creative team member to creative
15 contributor?

16 A. According to this, yes, it does.

17 Q. Is that some sort of equity status
18 or equity participation status?

19 A. I don't believe so.

20 Q. What portions of this Exhibit DC-2
21 include the equity participation that you --

22 A. I believe in paragraph 2 it
23 specifies characters.

24 Q. And these are characters that Neil
25 had created?

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2 A. I believe so.

3 Q. And look at the third page,
4 agreement, subparagraph, small "c." It talks of
5 licensing royalties. Would these be character
6 equity-type royalties?

7 A. I don't believe it is. I really
8 don't know.

9 Q. So your involvement with Neil and
10 his agent in negotiating an agreement would have
11 taken place after the date of DC-2?

12 A. I don't recall the timing of that,
13 so I don't know if it was before or after.

14 (Exhibit DC-3 for
15 identification, two-page letter, 5-24-93, to
16 Haifetz, from Cunningham.)

17 (A conference was held between the
18 witness and her attorney.)

19 Q. Terri, I've asked the court
20 reporter to mark and give you a two-page letter
21 that appears to be from you to Merilee Haifetz,
22 dated May 24, 1993, that we've marked as Exhibit
23 DC-3. I ask you to take a moment to read
24 through the document and tell me if you
25 recognize it.

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2 A. I do recognize it.

3 Q. What is this letter?

4 A. It was a letter outlining the
5 details of the terms between Neil Gaiman and DC
6 Comics.

7 Q. And are these terms that are to be
8 in a writer's services agreement or in a
9 character equity agreement?

10 A. It could be both.

11 Q. This indicates, if I understand it
12 correctly, in the second paragraph, that Neil
13 had been working on the Sandman character now
14 for five years? I'm sorry. Had been working on
15 the Sandman comic book for five years?

16 A. Yes. I believe that's the right
17 time.

18 Q. And the increase in his creator
19 participation was going to become effective with
20 issue No. 50 of Sandman?

21 A. Yes.

22 Q. Just so I can try to correlate
23 these numbers to the numbers in either 57 or 58,
24 those two exhibits, which are the signed
25 agreements in the '92/'93 era, where would I

1 TERRI CUNNINGHAM - CONFIDENTIAL, ATTORNEYS' EYES ONLY
2 find the royalty numbers at the end of the
3 second paragraph of Exhibit DC-3?

4 MR. PERKINS: Which ones? There
5 are a lot of different royalty numbers. Second
6 paragraph?

7 MR. KAHN: Yes.

8 Q. At the end of the second paragraph,
9 creator's share on nonreturnable books would now
10 be 0.5 percent for books selling 40,000 to
11 100,000, and 0.8 percent for any books over
12 100,000.

13 MR. ARNTSEN: At the risk of moving
14 this along, look at 1-A-2 --

15 MR. KAHN: Of Exhibit 58?

16 MR. ARNTSEN: -- of Exhibit 58. I
17 apologize.

18 Q. Has Mr. Arntsen directed us to the
19 correct place?

20 A. Yes.

21 Q. And that is in the character equity
22 agreement marked 58?

23 A. Yes.

24 Q. And this is an increase in royalty
25 rates made after 50 issues of Sandman?

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2 A. Yes, I believe so.

3 Q. Do you know what the royalty rate
4 was or would have been before the increase?

5 A. No.

6 Q. We would just need to look at his
7 earlier contracts to find that?

8 A. Correct.

9 Q. I'm sure I've asked you this
10 before, Terri, and I apologize, but were you
11 involved in the preparation of Exhibit 58, which
12 is the character equity agreement?

13 A. I don't recall.

14 Q. But at least in your correspondence
15 with Neil's agents, some of the numbers you
16 mentioned to Neil's agent get put into the
17 character equity agreement marked as Exhibit 58;
18 correct?

19 A. No. That's not correct.

20 Q. Explain to me the correlation
21 between --

22 A. I dealt with Neil's agent during
23 different times during the course of Neil's
24 involvement with DC. I don't recall if she was
25 involved with this agreement.

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2 Q. Okay. Let me ask you to take a
3 look again at Exhibit 58. We've earlier talked
4 about the different royalty provisions under
5 section 1 entitled "Royalty." I want to move to
6 section 2, entitled "Contingencies Affecting
7 Royalties." Are you familiar with this
8 provision of the character equity agreement?

9 A. Yes.

10 Q. Who makes the decisions on how
11 these contingencies will affect royalties at DC
12 Comics?

13 A. I don't know.

14 Q. Who makes recommendations? Anybody
15 in your department make a recommendation?

16 A. No.

17 Q. Who would know at DC Comics how
18 section 2 of the character equity agreements
19 operate in actual situations where there are
20 contingencies affecting royalties?

21 A. Perhaps our accounting department.
22 Legal department.

23 Q. So if I were to give you a
24 hypothetical that involved a character covered
25 by a character equity agreement, and have a

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2 hypothetical in which there would be a certain
3 licensing use of that character or a version of
4 that character, would you be able to tell me how
5 this agreement operated and would affect the
6 royalties being paid in that situation?

7 A. I don't know if I could.

8 Q. For example, let us assume that you
9 have a writer who has created a character and is
10 given character equity in that character, and
11 then moves on to other projects. And subsequent
12 writers continue to use that character but
13 change the character's personality. And then
14 that changed character's personality gets
15 licensed for a toy or for a movie.

16 How would paragraph 2 operate?

17 A. It's a discretion call.

18 Q. Something DC Comics does?

19 A. Yes.

20 Q. Who is involved in making
21 discretion calls at DC Comics?

22 A. Paul Levitz.

23 Q. Anybody else?

24 A. No.

25 Q. I'll give you one other

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2 hypothetical. We have a -- actually I'll give
3 you an actual example, and if I mischaracterize
4 it, Allen will correct me.

5 Neil Gaiman creates a character for
6 an issue of Spawn Comics, and the character is a
7 version of Spawn in the middle ages; okay? And
8 he's wearing armor and other things appropriate
9 for the middle ages. And he appears in eight
10 pages of the comic book, and then gets killed
11 off. And a year later a toy is made based on
12 the artwork of that character.

13 Assuming that what was done by Neil
14 was enough to get a character equity agreement,
15 how would that affect -- how would the fact that
16 the character was killed off and then made into
17 a toy get factored into these contingencies
18 affecting royalties?

19 A. I don't think I can answer that
20 question. I don't know.

21 Q. That would be something Paul Levitz
22 would decide?

23 A. Yes.

24 Q. It would appear, from looking at
25 Neil Gaiman's contracts, that the first

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2 character equity rights granted to him come
3 after he's written 12 issues of the comic. Does
4 that jibe with your recollection?

5 A. According to these documents, yes.

6 Q. Does DC Comics have a requirement
7 of a certain number of issues that a writer has
8 to work on before that writer can get character
9 equity?

10 A. No.

11 Q. Have you given character equity to
12 writers who have written one issue?

13 A. Yes.

14 Q. Who was that?

15 A. I don't recall. There's too many
16 of them.

17 Q. And do they typically get the 10
18 percent character equity?

19 A. Typically, yes.

20 Q. Other than Neil Gaiman with his 15
21 percent numbers, at least for the Sandman
22 characters we've seen so far, are there other
23 writer creators at DC Comics who have worked for
24 DC Comics who have a 15 percent character equity
25 share?

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2 A. I don't recall.

3 Q. Who would know that?

4 A. The legal department.

5 (Brief interruption.)

6 (Discussion off the record.)

7 (Exhibit DC-4 for
8 identification, document pages produced by DC
9 Comics in response to subpoena, production Nos.
10 DC 0029 through DC 0033.)

11 Q. Can you take a look at what the
12 court reporter has marked as Exhibit DC-4, which
13 consists of some of the pages of documents
14 produced by DC Comics in response to a subpoena,
15 namely DC 0029 through 0033. And then once
16 you've had a chance to look through it, help me
17 understand what it is.

18 A. Yes, I recognize it. It's the
19 process of how we requested equity for Timothy
20 Hunter from Bill Gaiman.

21 Q. Can you take me through the process
22 as reflected in these documents?

23 A. Start from the back?

24 Q. Okay.

25 A. The underlying internal memos is

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2 between the editor and my department, in some
3 cases, or myself, providing information so we
4 could turn it into a request for Paul Levitz,
5 which is a memo dated March 24th, 1993.

6 Q. That's the one stamped DC 0030?

7 A. Yes, of which was approved. And
8 the contract request is on top, March 29th,
9 1993, to the legal department requesting the
10 character equity.

11 Q. So looking at the second page of
12 this exhibit, this is form of request?

13 A. Second page is a memorandum at the
14 time to Paul Levitz requesting character equity
15 in this character.

16 Q. And help me understand. It says,
17 "The following standard equity is requested."

18 A. At the time, that was the standard
19 equity. That's how we presented it.

20 Q. And what is the standard equity?

21 A. They have changed over the years.
22 I don't recall exactly what it was in 1993.

23 Q. Okay. So you're requesting half
24 the normal creator royalty if these characters
25 appear in their own DC title?

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2 A. Yes.

3 Q. And you just don't remember what
4 the normal creator royalty was back then?

5 A. No, I don't.

6 Q. You're requesting 20 percent media,
7 merchandising royalty?

8 A. Yes.

9 Q. Based on net receipts?

10 A. Yes.

11 Q. The first page, then, would suggest
12 that -- you confirm if it's right -- that Paul
13 Levitz has approved the request and you're now
14 restating it for the legal department.

15 A. Yes. That is correct.

16 Q. And the next step in the process
17 would be for the legal department to draft a
18 character equity agreement?

19 A. Yes.

20 Q. Let me show you the one we have and
21 you tell me if that's the right one.

22 MR. KAHN: I'll ask the court
23 reporter to mark it.

24 (Exhibit DC-5 for
25 identification, cover letter from J. Brown, with

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2 attachment, amendment to a prior agreement,
3 character equity in the Timothy Hunter
4 character.)

5 Q. Terri, have you had a chance to
6 look at Exhibit DC-5?

7 A. Yes.

8 Q. Can you identify it?

9 A. I believe -- it looks like an
10 amendment or an addition to a prior agreement,
11 but it does look like character equity in the
12 Timothy Hunter character.

13 Q. And there's a cover letter from
14 Jeddy Brown. Do you know a Jeddy Brown?

15 A. Yes.

16 Q. Who is she? Was she?

17 A. She was a coordinator working in my
18 department sending out contracts and back and
19 forth to talent.

20 Q. So if we look at section 1 under
21 "Royalties." And I'm tracking back to Exhibit
22 DC-4, which is this memo to the legal
23 department, where it says, "The following
24 standard equity is requested," and then it says,
25 "Half the normal creator royalty of these

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2 characters appear in their own DC title." And I
3 see here in the contract, which is included in
4 Exhibit DC-5, some royalty numbers for DC
5 editions.

6 A. Yes.

7 Q. Do you know why the, quote,
8 "standard," close quote, equity requested was
9 half the normal creator royalty?

10 A. I believe that was the deal at the
11 time.

12 Q. And who would get the normal
13 creative royalty as opposed to half of it?

14 A. I don't know if I can answer that.
15 This is what the deal was for equity.

16 Q. "This" being what appears in
17 Exhibit DC-5?

18 A. Right. This was our deal for
19 equity. The way this memo was written, that's
20 what's confusing, I believe, because this is the
21 standard.

22 Q. So the standard deal --

23 A. I believe are the numbers; okay?

24 Q. Then let's look also at media
25 right, which is subparagraph small "d" which is

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2 in the second page of the contract and third
3 page of the document, which is 10 percent of
4 publisher's net receipts. Do you see that?

5 A. Yes.

6 Q. Does that correlate with
7 information on Exhibit DC-4 of the first page in
8 the request to legal?

9 A. Yes.

10 Q. Because 20 percent --

11 A. Is for both creatives. That's the
12 key there.

13 Q. Got you. So that Neil Gaiman's
14 standard equity in this deal is 10 percent.

15 A. I believe so, yes.

16 Q. And then the artist would get a
17 similar character equity agreement with a 10
18 percent number.

19 A. I believe so.

20 Q. Let me ask you to turn the page to
21 the third page, the last subparagraph under
22 section 1, which is entitled "Merchandising and
23 Promotional Licensing." On Neil Gaiman's deal,
24 part of DC-5, it states that the royalty
25 percentage is 10 percent; correct?

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2 A. Yes.

3 Q. And if we look back at Exhibit
4 DC-4, that 10 percent to Neil would be the
5 standard equity because the artist would get a
6 10 percent as well.

7 A. Yes.

8 Q. So we're dividing up a 20 percent
9 pool between the artist and writer, giving them
10 both 50 percent.

11 A. Yes.

12 Q. At least on Exhibit DC-4, that was
13 the standard equity deal; correct?

14 A. I believe so.

15 (A conference was held between the
16 witness and her attorney.)

17 (Discussion off the record.)

18 (A brief recess was taken.)

19 Q. Terri, I've asked the court
20 reporter to mark three Neil Gaiman contracts as
21 DC-6, DC-7, and DC-8.

22 (Exhibit DC-6 for
23 identification, character equity agreement
24 between Gaiman and DC Comics, Matthew the
25 Raven.) (Exhibit DC-7 for

1 TERRI CUNNINGHAM - CONFIDENTIAL, ATTORNEYS' EYES ONLY
2 identification, character equity agreement,
3 1-3-97, between Gaiman and DC Comics, Titanium.)

4 (Exhibit DC-8 for
5 identification, character equity agreement
6 between Gaiman and DC Comics, Auberon.)

7 Q. I wonder if you can look at them
8 and tell us what they are.

9 A. They are character equity
10 agreements between Neil and DC Comics for
11 different characters.

12 Q. Are you familiar with the character
13 in Exhibit DC-6, namely Matthew the Raven?

14 A. I know who the character is.
15 That's about it.

16 Q. When we look at the media rights in
17 merchandising and promotional licensing rights,
18 royalty rates on page 3 of this exhibit, I
19 notice that the media right royalty rate is 7.5
20 percent, and the merchandising and promotional
21 licensing rate is 7.5 percent.

22 Do you know how DC Comics arrived
23 at those royalty rates?

24 A. Neil was granted these percentages.

25 Q. These are percentages different

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2 than the 15 percent and different than the 10
3 percent that we've seen in other character
4 equity agreements. Do you know how the 7.5
5 percent was arrived at?

6 A. This was arrived at -- it was
7 special for Neil.

8 Q. Was it simply a matter of
9 negotiation that you arrived at 7.5?

10 A. I believe it was. I believe it
11 was. I don't recall the specifics, but I
12 believe it was negotiated.

13 Q. On Exhibit DC-7, that covers
14 another Sandman character, Titanium.

15 A. Uh-huh.

16 Q. On this one, if you look at page 3,
17 the royalty numbers for media rights and
18 licensing are 10 percent. Do you know how the
19 10 percent number is arrived at in this contract
20 dated January 3rd, 1997?

21 A. I don't.

22 Q. It's just a matter of negotiation?

23 A. I really don't recall, negotiation
24 or otherwise. I don't recall on this one.

25 Q. Same question on DC-8, which covers

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2 a character named Auberon where the royalty
3 numbers for media rights and licensing are also
4 10 percent. Do you recall how these numbers got
5 arrived at?

6 A. I don't.

7 Q. We've seen on Neil's contracts, at
8 least, royalty numbers from media rights and
9 merchandising and promotional licensing rights
10 of 7.5 percent, of 10 percent, and of 15
11 percent. Is it fair to say, at least with
12 respect to the character equity agreements in
13 which Neil is involved, that there's no basic
14 standard rate for these different items of
15 royalties?

16 A. No. I don't believe that's a fair
17 statement.

18 Q. How would you characterize it?

19 A. I believe it depends on the
20 negotiation at the time the character was
21 created. If he was represented; if he wasn't.
22 That's what I recall.

23 Q. Is it fair to say that a variety of
24 factors go into the setting of whatever the
25 royalty rates are in these character equity

1 TERRI CUNNINGHAM - CONFIDENTIAL, ATTORNEYS' EYES ONLY
2 agreements?

3 A. Yes. Yes.

4 Q. Did you become aware in 1997 that
5 Neil Gaiman and Todd McFarlane were attempting
6 to work out some agreements between the two of
7 them over some of Neil's contributions to the
8 Spawn comic book series?

9 A. I recall that there was some issues
10 about what you're talking about, yes.

11 Q. When did you first learn of it?

12 A. I don't recall.

13 Q. Let me see if we can try to hone in
14 on at least a certain part of the year.

15 MR. KAHN: I ask the court reporter
16 to mark as DC-9 a handwritten note from you to,
17 I believe, Neil Gaiman, dated May 2nd, 1997.

18 (Exhibit DC-9 for
19 identification, handwritten note, 5-2-97, to
20 Gaiman, from Cunningham.)

21 Q. Is this your note, Terri?

22 A. It is, yes.

23 Q. Is this a note you sent to Neil?

24 A. Yes.

25 Q. Do you recall what was in Oakland

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2 earlier that week that you returned from?

3 A. I do. In Oakland there was a comic
4 book convention that -- the name escapes me
5 right now. And it happened in April -- or had
6 happened in April every year at Oakland,
7 California.

8 Q. And during that convention that you
9 attended, did you happen to have a conversation
10 with Neil about his dealings with Todd?

11 A. I don't recall the conversation. I
12 do recall that he asked me to send him a copy of
13 the agreement, which I did. Of his agreement.

14 Q. Did he tell you why he wanted you
15 to send him a copy of his agreement?

16 A. I don't recall specifically the
17 conversation at all.

18 Q. Do you recall how you picked out
19 the agreement that you sent him?

20 A. I believe he asked me for it
21 specifically.

22 Q. But you don't recall why he asked
23 you for it.

24 A. No, other than I knew there was
25 something with Todd.

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2 Q. Did you happen to talk with Todd as
3 well when you were out in Oakland at --

4 A. Not that I recall.

5 Q. Did Neil tell you exactly what he
6 and Todd were trying to work out?

7 A. I really do not recall the
8 conversation.

9 Q. So something having to do with his
10 dealings with Todd.

11 A. Yes, which is why I believe he
12 wanted me to send a copy of our agreement.

13 (Discussion off the record.)

14 Q. Terri, let me show you what was
15 previously marked as Exhibit 2. It's really not
16 a very good copy of a faxed letter from Neil to
17 Todd where, as you will see, your name shows up
18 on the second page.

19 MR. ARNTSEN: So the record is
20 clear, it's not clear it's a fax from Neil to
21 Todd. It's clear it's a fax from Todd to Paul.

22 MR. KAHN: Right. Either a letter
23 or a fax. It's a letter that either was mailed
24 or faxed.

25 Q. This letter from Neil to Todd is

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2 dated May 5th, 1997, and I notice that your
3 note, which was Exhibit DC-9, was dated May 2nd,
4 1997. And there was a reference in the second
5 page of Neil's letter, which is Exhibit 2. Is
6 this description of a conversation that Neil had
7 with you a conversation that you recall?

8 A. No. I don't recall a conversation.

9 Q. So it could have happened?

10 A. Possibly.

11 Q. Does it sound -- strike that. If
12 we go back to the first page, he has, in Exhibit
13 2, various percentages going down this page,
14 starting with something called creator royalty
15 at .5 percent of the cover price, 100,000, and
16 .8 percent after that. Those two numbers, I
17 believe, are ones that we found in the character
18 equity agreement that was marked as Exhibit 58;
19 correct?

20 A. Yes. Correct.

21 Q. And that was a set of numbers that
22 actually represented an increase that DC Comics
23 gave Neil after he wrote 50 issues of Sandman;
24 correct? At least according to your letter to
25 Merilee Haifetz, marked Exhibit DC-3?

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2 (A conference was held between the
3 witness and her attorney.)

4 A. I don't believe the dates are
5 right, your Exhibit 58. I believe this
6 agreement is prior to my correspondence with
7 Merilee.

8 Q. At least the agreement is dated
9 prior to your conversation with Merilee.

10 A. Right. And dealings.

11 Q. Correct. So when did the royalty
12 rate, to your recollection, creator royalties,
13 go up to .5 percent of the cover price to
14 100,000 copies, and .8 percent of the cover
15 price?

16 A. I don't recall the specific dates.
17 It would vary, depending on the agreement we had
18 with Neil.

19 Q. Does Exhibit DC-3 tend to suggest
20 that this was an increase that was to be made
21 after issue 50?

22 MR. ARNTSEN: Object. Vague. I
23 don't know how a document tends to suggest. But
24 that's fine.

25 MR. PERKINS: You may answer, if

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2 you like.

3 A. Yes, I do believe that is the case.

4 MR. KAHN: Can we take a
5 five-minute break? I'll come back. I bet I'll
6 be done.

7 (A brief recess was taken.)

8 Q. Terri, while you were out on the
9 break, we were looking at your letter which is
10 marked Exhibit DC-3 and is dated May 24th, 1993.
11 We were looking at the character equity
12 agreement that is dated as of -- or originally
13 was dated as of April 20th, 1993. Someone
14 scratched that out and dated it as of February
15 1, 1993. We looked down at the document
16 identifier at the bottom of the page in small
17 print that appears on each page, and it's clear
18 on some pages and not others, but there is a
19 code there which appears to be a date of
20 9-30-93.

21 And is it possible that this
22 contract marked as Exhibit 58 was, in fact,
23 finalized after your May 24th, 1993 letter but
24 was dated with an as-of date that was prior to
25 your letter?

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2 A. I really don't recall the dates on
3 here, why and how.

4 Q. Let me ask you to look at Exhibit
5 57 which you'll see has a date originally,
6 before it was scratched out, dated as of August
7 1, 1993. And somebody has typed that out at the
8 top and dated it as of September 1, 1992. And
9 that covers a certain number of issues of
10 Sandman; correct?

11 A. Yes.

12 Q. Beginning with what issue?

13 A. Issue 50.

14 Q. And your letter of March 24th, 1993
15 states that certain writer creator shares that
16 are being increased will be effective with
17 Sandman No. 50?

18 A. Yes.

19 Q. Was it the practice of DC Comics to
20 date a writer's services agreement for a certain
21 number of issues of a comic book as of a date
22 prior to the commencement of that particular set
23 of issues?

24 A. I don't recall how it was done. I
25 don't recall.

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2 Q. In any event, in your letter of May
3 24th, 1993, which is Exhibit DC-3, do you
4 understand yourself to be telling Neil's agent
5 that you -- that DC Comics has decided to
6 increase his participation -- creator
7 participation for all DC editions to a full
8 writer creator share of 50 percent that will
9 become effective with Sandman No. 50?

10 A. Yes.

11 Q. And that would translate into a
12 creator share on nonreturnable books of 0.5
13 percent for books selling 40,000 and 100,000,
14 and 0.8 percent for any books over 100,000?

15 A. Yes.

16 Q. Going back to Exhibit 2 where we
17 have creator royalties with those same numbers
18 of .5 percent and .8 percent, does that appear
19 to you, based on the contracts and the
20 correspondence we've looked at, to be a creator
21 royalty rate that became effective after Mr.
22 Gaiman had written 49 issues of Sandman?

23 A. Yes. That's how it appears.

24 Q. And before he had written those 49
25 issues of Sandman -- or during the time he was

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2 writing the 49 issues, 1 through 49, he had a
3 lower royalty rate for creator royalty?

4 A. Yes, if he had one at all.

5 Q. At this point, you can't remember.

6 A. Depends on the agreement, actually.

7 Q. Okay. And the reference that Neil
8 makes to a conversation with you in Exhibit 2,
9 you've already testified, may have happened.
10 You just don't recall.

11 A. Correct.

12 Q. Other than the one conversation
13 that you had with Neil in Oakland during that
14 convention, which was in late April of 1997,
15 from that point going forward do you recall
16 during the year 1997 any other conversations
17 with Neil Gaiman regarding his discussions and
18 negotiations with Todd McFarlane?

19 A. I do not recall.

20 Q. It may have happened?

21 A. It may have happened.

22 Q. You just don't recall.

23 A. I don't recall.

24 Q. Between your meeting with Neil
25 Gaiman in Oakland in April of 1997, throughout

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2 the rest of the year 1997, do you recall any
3 conversations with Todd McFarlane about --
4 either about Neil Gaiman, or his discussions
5 with Neil Gaiman, or more generally about how DC
6 Comics contracts operate?

7 A. I don't recall.

8 Q. Could have happened? You just
9 don't recall?

10 A. Correct.

11 Q. Other than your attorneys, Terri,
12 have you spoken to anyone about this deposition?
13 Other than your attorneys and any family
14 members.

15 A. No.

16 Q. No conversations with any other
17 lawyers?

18 A. No.

19 Q. Not with Mr. Arntsen?

20 A. No.

21 Q. Ken Levin?

22 A. No.

23 Q. Have you talked to Neil Gaiman
24 about your deposition?

25 A. No.

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2 Q. I have no further questions, Terri.

3 Thank you.

4 A. You're welcome.

5 MR. ARNTSEN: I've just got a
6 couple.

7 EXAMINATION BY MR. ARNTSEN:

8 Q. Looking at the different -- you've
9 been shown various contracts here with various
10 royalty rates for various things. Is it the
11 case that the specific numbers that find their
12 way into a particular contract are simply the
13 subject of negotiation between DC and the
14 creator?

15 A. Yes.

16 Q. And I gather that by the early
17 1990s, Neil Gaiman -- DC paid Neil Gaiman at the
18 high end of its standard royalty rate; is that
19 correct?

20 A. Yes.

21 Q. And that was largely driven by the
22 success of Neil's work on the Sandman comic;
23 correct?

24 A. Yes, I believe so.

25 Q. And in Sandman, Neil took a

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2 pre-existing character and modified him;
3 correct?

4 A. Yes.

5 Q. He also created some additional
6 characters; right?

7 A. Yes.

8 Q. And so the record is clear on this,
9 do you have any recollection at all about any
10 conversations, phone conversations, with Todd
11 McFarlane in the latter half of 1997 concerning
12 DC's standard policies or provisions relating to
13 character equity agreements?

14 A. I don't recall.

15 Q. And if I understand correctly from
16 looking at these agreements -- first of all,
17 specific royalties that go into different
18 provisions are sort of a function of the
19 relative negotiating positions of DC and the
20 creator; is that correct?

21 A. Yes, it is.

22 Q. And then there also seems to be
23 another factor that relates to the extent to
24 which the creator contributed to a particular
25 character; is that correct?

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2 A. For specific agreements?

3 Q. Yes. For specific agreements.

4 Like there are references to things like spinoff
5 elements. Things like that.

6 A. Could you repeat your question?

7 Q. Yes. Is one of the factors that
8 goes into a specific royalty rate that a creator
9 may receive for various applications of a
10 character the extent to which that creator
11 contributed to that particular character?

12 A. Possibly. Again, that might be a
13 discretion call, if I understand your question.

14 Q. For instance -- do you have Exhibit
15 DC-2 in front of you?

16 Can you turn to -- I believe it's
17 the third page of it. It says G 4024. Again --
18 first of all, just for the record, if you look
19 at the first page, this is a January 2, 1990
20 amendment to Neil Gaiman's DC contract; correct?

21 A. Yes.

22 Q. And looking first on this third
23 page, the G 4024, under "Licensing Royalties,"
24 as of that time, Neil is already getting the 15
25 percent of various applications of a character;

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2 correct?

3 A. Yes. According to this contract,
4 yes.

5 Q. And that would include motion
6 picture, television, merchandising, promotional
7 licenses; correct? If you look at the
8 second-to-last sentence of sub "c" on page 4024.

9 A. Yes.

10 Q. And then going down, under "d,"
11 "Limitations," that talks about spinoff
12 elements; correct?

13 A. It does.

14 Q. And if I understand correctly,
15 looking back to the first page of Exhibit DC-2
16 -- I'm moving back and forth -- if you look in
17 No. 2, the last sentence talks about spinoff
18 elements; correct?

19 A. Yes, it does.

20 Q. And that distinguishes between
21 spinoff elements and pre-existing elements;
22 correct?

23 A. Yes.

24 Q. Again, what these terms relate to
25 are a particular creator's relative

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2 contributions to a character; correct?

3 A. Yes.

4 Q. And that concept can play into the
5 particular royalty rates for a particular
6 character; correct?

7 A. Yes.

8 Q. Again, like anything else, this is
9 ultimately a subject of negotiation; correct?

10 A. The percentage is, yes.

11 Q. That's all I have. Thank you.

12 MR. KAHN: I have a few follow-up.

13 FURTHER EXAMINATION BY MR. KAHN:

14 Q. You agreed with Allen when he asked
15 if what Neil had done with Sandman was take an
16 existing character and make modifications to
17 that character; correct?

18 A. Yes.

19 Q. How would you describe those
20 modifications?

21 A. I can't. He -- I really can't.
22 I'm not a creative person.

23 Q. Is it your understanding there were
24 significant modifications or minor
25 modifications?

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2 A. Yes. They were significant.

3 Q. Significant in what way?

4 A. Significant in -- as far as the
5 person making the decision decided they were
6 significant enough to warrant the deal that we
7 gave him.

8 Q. And as we saw from earlier, those
9 -- that deal took effect after he'd written 12
10 issues of the comic book Sandman; correct?

11 A. I believe so.

12 Q. One thing I neglected to ask you
13 before, because you're my only DC Comics person.
14 If you go to Exhibit 58 we have, under section 2
15 which starts at page 4 of that exhibit,
16 something that Allen just mentioned, spinoffs,
17 among the contingencies affecting royalties.
18 And there's another section called "Commingling
19 of Elements," which is section B.

20 And it states halfway through
21 section B, "Notwithstanding the foregoing, no
22 royalty shall be due for any minor use of the
23 characters." And then it goes on to define what
24 minor use is. I'm not a comic maven so I hope
25 you can tell me about these terms. "Used

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2 herein, 'minor use' shall mean a use of the
3 characters in another property as in, for
4 example" -- the first example is "multiproperty
5 crossovers." What is that?

6 A. I am not an expert in legal issues
7 and the way contracts are written, either. And
8 these are paragraphs that I really don't think I
9 can even answer.

10 Q. So there's no --

11 A. I would go to the legal department,
12 personally, to get those answered.

13 Q. As somebody who's worked in the
14 comic book industry for 19 years, do you have an
15 understanding of what, in the nonlegal context,
16 a multiproperty crossover is?

17 A. It could mean a number of things.

18 Q. It has no specific meaning to you?

19 A. No.

20 Q. How about "guest appearances"?

21 That's the next example of a minor use. What is
22 a guest appearance in a comic book?

23 A. A guest appearance is when a
24 character appears in another title, such as when
25 you put Sandman in with Superman, as an example,

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2 for one issue, as a guest appearance.

3 Q. So this is saying to Neil, "If
4 Sandman makes a guest appearance in an issue of
5 Superman," using your example, "that will be
6 deemed a minor use and you won't get royalties
7 for that."

8 MR. PERKINS: I object to the
9 question. She's already said she can't
10 interpret the agreement. You asked her what
11 "guest appearance" means to her. She's not
12 here to --

13 Q. I will not ask you to interpret the
14 agreement. But you just gave me your
15 understanding of what a guest appearance is.

16 A. Yes.

17 Q. Good. The next example they give
18 of a minor use is "an occasional team-up." What
19 does that mean in the comic book world?

20 A. I believe it would vary on a
21 case-by-case, so I can't give you a definition
22 right now.

23 Q. Can you give me an example?

24 A. If two characters or three
25 characters team up in one book, then it's a

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2 team-up. No, I guess I can't, more than that.

3 Q. Next category, cameos. In the
4 comic book world, what's a cameo?

5 A. I believe it's a guest appearance
6 as well.

7 Q. And then the last two, I think I
8 understand. Who's Who, or other index-type
9 listings, as those terms are commonly used in
10 comic book --

11 A. More factual listing of characters.
12 Visual and copy. Who Bat Man and Superman are.
13 That's what Who's Who is.

14 Q. Thanks. No other questions.

15 MR. ARNTSEN: Just one more.

16 FURTHER EXAMINATION BY MR. ARNTSEN:

17 Q. If I understand from your answer
18 with Mike's hypothetical, if Sandman made a
19 guest appearance in a Superman comic, you don't
20 know whether Neil would be paid for that?

21 A. I don't. I really don't.

22 Q. Thanks.

23 (Continued to next page to include
24 jurat.)
25

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2 A. You're welcome.

3 MR. PERKINS: I have no questions.

4 (Deposition concluded at 3:05 p.m.)

5

6

7

8

TERRI CUNNINGHAM

9

10 Subscribed and sworn to before me

11 this ____ day of _____, 2002.

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STATE OF NEW YORK)

2) ss:

3 COUNTY OF NEW YORK)

4 I wish to make the following changes, for
the following reasons:

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21

22 TERRI CUNNINGHAM

23 Subscribed and sworn to before me
24 this _____ day of _____, 2002.

25

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2 C E R T I F I C A T E

3
4 STATE OF NEW YORK)

5 : ss.

6 COUNTY OF NEW YORK)
7

8 I, MARLENE LEE, a Certified
9 Shorthand Reporter, Certified Realtime Reporter
10 and Notary Public within and for the State of
11 New York, do hereby certify:

12 That TERRI CUNNINGHAM, the witness
13 whose deposition is hereinbefore set forth, was
14 duly sworn by me and that such deposition is a
15 true record of the testimony given by the
16 witness.

17 I further certify that I am not
18 related to any of the parties to this action by
19 blood or marriage, and that I am in no way
20 interested in the outcome of this matter.

21 IN WITNESS WHEREOF, I have hereunto
22 set my hand this 30th day of July, 2002.

23
24 Marlene Lee

25 MARLENE LEE, CSR, CRR